

T.C. Memo. 2001-316

UNITED STATES TAX COURT

FENNEL TRUST, Petitioner v.
COMMISSIONER OF INTERNAL REVENUE, Respondent

Docket No. 10710-00.

Filed December 20, 2001.

Sam D. Scholar, for petitioner.

Mary Ann Waters, for respondent.

MEMORANDUM OPINION

DAWSON, Judge: This case was assigned to Special Trial Judge Robert N. Armen, Jr., pursuant to the provisions of section 7443A(b)(5) and Rules 180, 181, and 183.¹ The Court agrees with and adopts the opinion of the Special Trial Judge, which is set forth below.

¹ Unless otherwise indicated, all section references are to the Internal Revenue Code, as amended, and all Rule references are to the Tax Court Rules of Practice and Procedure.

OPINION OF THE SPECIAL TRIAL JUDGE

ARMEN, Special Trial Judge: This matter is before the Court on respondent's Motion to Dismiss for Lack of Jurisdiction. Respondent maintains that the petition was not filed by a person with authority to represent Fennel Trust (Fennel or petitioner).² Petitioner opposes respondent's motion. As discussed in detail below, we shall grant respondent's motion to dismiss.

Procedural Background

Respondent issued a notice of deficiency to Fennel determining deficiencies in its Federal income taxes and additions to tax as follows:

<u>Year</u>	<u>Deficiency</u>	<u>Additions to tax</u>	
		<u>Sec. 6651(a)(1)</u>	<u>Sec. 6651(a)(2)</u>
1995	\$10,265	\$2,567	---
1996	9,486	2,372	To be determined.

The Court subsequently received and filed a timely petition for redetermination challenging the notice of deficiency. The petition was signed "Paul Jablonski, Mng Dir".

Respondent filed a Motion to Dismiss for Lack of Jurisdiction on the ground that the petition was not filed by a party authorized to represent petitioner in this matter.

² Use of the terms "trust", "trustee", "trust instrument", and their derivatives is intended only for narrative convenience to describe the form of the disputed transactions. By our use of such terms, we do not mean to suggest any conclusion concerning the actual substance or characterization of the transactions for tax purposes.

Petitioner filed a response to respondent's motion, asserting that Paul Jablonski is its duly appointed trustee.

The Court subsequently issued an Order directing petitioner to file a supplemental response to respondent's motion to dismiss attaching thereto: (1) A complete copy of the original trust instrument; (2) a complete copy of all trust records relating to the appointment, resignation, and/or acceptance of appointment by trustee(s); and (3) a copy of all Forms 56, Notice of Fiduciary Relationship, if any, filed with the Commissioner in the name of the trust. Thereafter, petitioner filed a supplemental response to respondent's motion, attaching several documents, including the purported Fennel trust instrument and certain records relating to the appointment of trustees.³

This matter was called for an initial hearing and, later, an evidentiary hearing at motions session in Washington, D.C. Counsel for both parties appeared at the hearings and offered argument and evidence with respect to respondent's motion to dismiss.

At the evidentiary hearing, the parties lodged a stipulation of facts with attached exhibits, which was received by the Court and filed as evidence in respect of the jurisdictional issue presented by respondent's motion to dismiss. At the conclusion of the hearing, the Court directed the parties to file memorandum

³ The record shows that no Form 56 was filed with the Commissioner for Fennel.

briefs in support of their respective positions. Although respondent complied with this order, counsel for petitioner filed with the Court a notice stating that petitioner could not afford the expense of preparing and filing a brief.

Factual Background

Paul Jablonski and his brother David Jablonski were shareholders of D.J. Enterprises, Inc., a company that operated a residential/commercial security business known as Burtel and American Home Security. In 1994, Paul and David Jablonski purchased a number of "trust packages" from a company known as Cypress Management in Orem, Utah.

The record includes a purported trust instrument for a "business trust organization" identified as S&T Management Trust. This document, which identifies D.J. Enterprises, Inc., as "settlor/exchanger" and Cypress Management as "trustee", is dated April 19, 1994, and includes a signature page that was signed by David Jablonski as president of D.J. Enterprises, Inc., and by an individual identified as Zola Sheehan for Cypress Management.⁴

⁴ The purported trust instrument also states that its "creator/drafter" is Zola Sheehan as "Trustee In Independent Contractor status with Cypress Management".

The record also includes a purported trust instrument for Fennel, which is likewise characterized as a "business trust organization". This document, the typewritten cover sheet of which identifies S&T Management Trust as "settlor/exchanger" and Paul Jablonski as second trustee, is dated April 28, 1994, and includes a signature page that was signed by S&T Management Trust as "settlor/exchanger", Zola Sheehan for Cypress Management as "trustee", and Paul Jablonski as "second trustee".⁵ S&T Management Trust, Zola Sheehan, and Paul Jablonski all purportedly appeared before a notary public in the "Utah Republic" and signed the signature page on July 19, 1994. However, Paul Jablonski admits that he never met Zola Sheehan, that he did not appear before the notary public in Utah, and that he executed the signature page of the Fennel trust instrument in Virginia.⁶ In fact, the signature page of the Fennel trust instrument is an exact copy of the signature page of a purported

⁵ The typewritten cover sheet for the purported trust instrument for Fennel contains a handwritten alteration deleting Cypress Management as trustee and making Paul Jablonski "First trustee". However, in view of the manner in which S&T Management Trust, Zola Sheehan, and Paul Jablonski signed the signature page, we disregard these alterations to the cover sheet.

⁶ Paul Jablonski does not know Zola Sheehan's address or telephone number or how Zola Sheehan can be contacted; similarly, he does not know Cypress Management's address or how Cypress Management can be contacted.

trust document for another trust known as Tarragon Trust.⁷

Article Five "Power of Trustees", section 5.5 of the Fennel trust instrument states as follows:

NOTWITHSTANDING any other provision in this Trust instrument, no power shall be exercised, nor any action taken, by the Trustees except upon the unanimous consent of all Trustees having authority as supplemented by the minutes and resolutions to exercise that power, and shall not be construed to contrivance [sic] of any constitutional state or federal law.

"Schedule B" attached to the Fennel trust instrument lists the property transferred to the trust as follows:

Twenty-One (21) Silver Dollars (face value); Pre-1964 Coinage of Account of the United States of America; One (1) Ten Dollar Bill; Love & Kindness[;] HEWLETT PACKARD PRINTER.

"Attachment A" to the Fennel trust instrument is an undated letter signed by Paul Jablonski and addressed to "The Settlor of Fennel Trust", stating: "I am in receipt of your letter dated 28 April 1994, appointing me Trustee of Fennel Trust, WHICH I HEREBY ACCEPT IMMEDIATELY."

"Schedule C" attached to the Fennel trust instrument lists the trust's beneficiary as S&T Management Trust, which "surrendered" its "beneficial" interest in favor of Rosaria Jablonski. Rosaria Jablonski is Paul Jablonski's wife.

⁷ Tarragon Trust is a petitioner in a related docket in which the Commissioner has also filed a Motion to Dismiss for Lack of Jurisdiction. See docket No. 10709-00 and our Memorandum Opinion at T.C. Memo. 2001-315.

During the evidentiary hearing in this case, petitioner offered to the Court a document purportedly reflecting Cypress Management's resignation as trustee for Fennel Trust, as well as a document purportedly reflecting Cypress Management's resignation as trustee for Tarragon Trust. Considering that these documents were undated, as well as other discrepancies in the record, the documents were not admitted into evidence.⁸

On April 30, 1994, Fennel and S&T Management purportedly executed a document entitled "INDEPENDENT COMMON-LAW CONTRACTOR CONTRACT", in which S&T Management and Fennel were identified as contractor and client, respectively.

Fennel did not file a U.S. Fiduciary Income Tax Return, Form 1041, for 1995 and 1996.⁹ However, for those years, Fennel received a Schedule K-1, Beneficiary's Share of Income, Deductions, Credits, etc., from BHC Trust, another "business trust organization" whose purported trust instrument was the work of Zola Sheehan. The Schedule K-1 for 1996 reflects a loss in the amount of \$2,180. Paul and Rosaria Jablonski attached this Schedule K-1 to their Federal income tax return for 1996 and used

⁸ The document offered with respect to Tarragon Trust differed in material respects (including signatories and typeface) from another document that Tarragon Trust had offered to reflect Cypress Management's resignation as trustee.

⁹ Indeed, Fennel did not file an income tax return from its inception through 1999.

the loss on the Schedule K-1 to offset their other income.¹⁰

The parties agree that the law of the Commonwealth of Virginia controls with regard to the validity of the trusts described herein.

Discussion

According to respondent, petitioner failed to show that Paul Jablonski was petitioner's duly appointed trustee or that he otherwise had the capacity to unilaterally commence this action on petitioner's behalf. Respondent asserts that, as a result, no valid petition has been filed and we must dismiss the petition for lack of jurisdiction. We agree.

It is well settled that the taxpayer has the burden of proving the Court's jurisdiction by establishing affirmatively all facts giving rise to our jurisdiction. See Patz Trust v. Commissioner, 69 T.C. 497, 503 (1977); Fehrs v. Commissioner, 65 T.C. 346, 348 (1975); Wheeler's Peachtree Pharmacy, Inc. v. Commissioner, 35 T.C. 177, 180 (1960); Natl. Comm. To Secure Justice v. Commissioner, 27 T.C. 837, 838-839 (1957). Moreover, unless the petition is filed by the taxpayer, or by someone lawfully authorized to act on the taxpayer's behalf, we are without jurisdiction. See Fehrs v. Commissioner, supra at 348.

¹⁰ The record does not include the Schedule K-1 for 1995 or the Jablonskis' return for that year.

Rule 60(a) requires that a case be brought "by and in the name of the person against whom the Commissioner determined the deficiency * * * or by and with the full descriptive name of the fiduciary entitled to institute a case on behalf of such person." Rule 60(c) states that the capacity of a fiduciary or other representative to litigate in the Court shall be determined in accordance with the law of the jurisdiction from which such person's authority is derived. As previously mentioned, the parties agree that Virginia law is controlling in this case.

Based upon our review of Virginia law, we conclude that a trustee generally is a necessary party in an action brought on behalf of a trust. Accord Mendenhall v. Douglas L. Cooper, Inc., 387 S.E.2d 468 (Va. 1990); Raney v. Four Thirty Seven Land Co., 357 S.E.2d 733, 736 (Va. 1987); cf. Walt Robbins, Inc. v. Damon Corp., 348 S.E.2d 223, 226 (Va. 1986) (the trustee of an antecedent deed of trust is a necessary party in a suit to enforce a mechanic's lien).

We begin by observing that the petition filed in this case does not comply with Rule 60. In particular, Paul Jablonski signed the petition as managing director, and the caption that he placed on the petition identified the "Petitioner" as "FENNEL TRUST". However, neither the caption nor the body of the petition identified petitioner's trustee(s).

The record presented by petitioner to support its contention that Paul Jablonski was vested with the authority to institute this action on its behalf is inadequate. Considering the lack of formality observed in the execution of the Fennel trust instrument and related documents, we have serious doubts that the trust was validly formed. Nevertheless, assuming arguendo that it was, petitioner failed to prove that Paul Jablonski possessed the capacity to institute this action unilaterally.

Where a private trust is administered by two or more trustees, the general rule is that unanimity among the trustees is required for actions taken on behalf of the trust, except where this requirement is modified by the terms of the trust instrument or by statute. Scott, The Law of Trusts, sec. 194, at 161 (4th ed. 1988), and cases cited therein. Consistent with this principle, the Fennel trust instrument states in pertinent part that "no power shall be exercised, nor any action taken, by the Trustees except upon the unanimous consent of all Trustees having authority".

In the absence of any credible evidence that Cypress Management resigned as Fennel's trustee, we conclude that Paul Jablonski and Cypress Management were cotrustees of Fennel at the time that the petition was filed. The record indicates that Paul Jablonski commenced this action without informing, or obtaining the consent of, his cotrustee. Moreover, we are not aware of any

provision in the Fennel trust instrument, or under Virginia law, providing an exception to the principle that, as cotrustees, Paul Jablonski and Cypress Management were obliged to act jointly in filing the petition herein. It necessarily follows that Paul Jablonski lacked the capacity, acting alone, to commence this action on Fennel's behalf. Consequently, we shall grant respondent's motion to dismiss.

To reflect the foregoing,

An order will be entered
granting respondent's motion and
dismissing this case for lack of
jurisdiction.